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In The

Supreme Court of the United States

October Term, 1980

OSCAR WARING,

Petitioner,

vs.

KALGRAD NAVIGATION COMPANY, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

In The

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OSCAR WARING,

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KALGRAD NAVIGATION COMPANY, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REASONS FOR GRANTING THE WRIT

The charge by the court that a violation of OSHA regulations by the stevedore as the cause of the accident requires a verdict in favor of the shipowner is an error of law.

The purpose of this reply brief is not to reargue the petition for certiorari but to preserve intact the crucial issue which petitioner believes justifies the granting of the petition for certiorari.

Respondent would reduce the result to a simple credibility issue. Credibility is always a function of the jury and as factfinder it must decide the issues in dispute. That there were issues of dispute is manifest from the petition and respondent's brief in opposition. Suffice to say there was evidence received by the court on both sides of every issue.

However, the court in its charge required the jury to find the facts in accordance with the law which the court rendered to the jury. Petitioner has quoted in its petition that portion of the charge of the court which required the jury to exculpate the shipowner if the stevedore violated OSHA regulations[1] and if this violation was the sole cause of the accident. Respondent has added other portions of the charge which petitioner submits does not alter the stark mandate. In the instant case it was not disputed that petitioner was working on the face of a cargo twelve feet high. In the course of the testimony the trial court permitted extensive cross-examination of plaintiff's experts on the OSHA regulations and stressed that they had the force of law and that the stevedore had violated that law. The managing executive of the stevedore testified as an expert for the vessel-owner and confessed violation of the same OSHA regulations and blamed the accident on the violation of the OSHA regulations. The relevancy of receiving testimony or permitting cross-examination on the OSHA regulations was properly challenged on the ground that it destroyed the parallelism which is implicit in *Edmonds v. Compagnie Generale Transatlantique,* 61 L. Ed. 2nd 521 (1979).

Respondent on page 8 of its brief states that the OSHA regulations were only offered to apprise the jury of the stevedore's customary obligations in a discharge situation but then goes on to state that obviously the stevedore's failure to put

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1. Safety and Health Regulations for Longshoring (29 C.F.R. §1918.2, *et seq.).*

up a safety net did not cause the accident. The jury was never told that. The court didn't so charge. The jury was left with the clear undisputed fact that the man had fallen off a twelve foot face of cargo and that the stevedore by law was required to put up a safety net should the face of the cargo be more than eight feet. The court did not charge with specificity that this would not exculpate the vessel-owner if they permitted the stowage in prior ports creating this situation which the stevedore by the admission of its managing officer handled so badly. We have included as an appendix hereto the context of the court's charge on this issue.

This Court recently in *Scindia Navigation Co., Ltd. v. De Los Santos,* ____ U.S. ____, 68 L. Ed. 2d 1 (April 21, 1981) discussed the obligations of the vessel-owner under §905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b). In its wake this Court vacated and remanded *Bachtel v. Mammoth Bulk Carriers, Ltd.,* ____ U.S. ____, 68 L. Ed. 2d 835 (1981), 605 F. 2d 438 (9th Cir. 1979); *Griffith v. Wheeling-Pittsburgh Steel Corp.,* ____ U.S. ____, 610 F. 2d 116 (3d Cir. 1979), 68 L. Ed.2d 343 (1981); *Lawrence A. Sarauw v. Oceanic Navigation Corporation,* ____ U.S. ____, 68 L. Ed.2d 344, 622 F. 2d 1168 among others. Significantly it denied certiorari in *Ernst Russ Steamship Co. v. Matthews,* ____U.S. ____, 68 L. Ed. 2d 356 (1981), 603 F. 2d 676 (7th Cir.) and *Pittston Stevedoring Corp. v. Doca,* ____ U.S. ____, 65 L. Ed.2d 351 (1981), 634 F. 2d 30 (2d Cir.).

We have not yet been apprised as to the Ninth Circuit reconsideration of *Bachtel.* However the reconsideration in *Sarauw, supra,* and *Griffith, supra,* is in the opinion of the petitioner helpful.[2] In *Sarauw* the Court of Appeals for the Third Circuit in a case involving a gangway supplied by a

2. Slip Opinions attached hereto.

stevedore refused to divest the vessel-owner of its responsibility for safe securing and condition:

> "Here the stevedore, Hess, which was the owner of the marine terminal at which the ANDROS ATLAS was unloading, required all vessels unloading at its terminal to use only gangways supplied by it, the stevedore. Accordingly, here the gangway supplied by the stevedore became the vessel's gangway in the sense that it was the only gangway available to the vessel. It was, therefore, necessarily used for embarking and disembarking by the officers and crew of the vessel and any others having business on her as well as by the longshoremen. It thus became, when put in place, a basic appurtenance of the vessel, its means of access to the land, We are, accordingly, satisfied that *Scindia* does not require us to depart from our original conclusion, which we reaffirm, that Oceanic had the duty to exercise reasonable care with respect to the gangway's being properly secured to the vessel and maintained in safe condition for use. From this duty of care it could not divest itself even though the gangway was supplied by the stevedore, Hess, and at the time of the accident was being used by no one but the injured longshoreman. (citations omitted)
>
> . . . In the present case there was evidence from which the jury could find, as it did, that Oceanic failed in its duty of exercising due care to discover and correct the unsafe condition of the gangway which, obviously, became more and more critical as the vessel rose in the water during unloading."

In *Griffith, supra,* the district court had found that prior to turning control over to the stevedore the barge owner knew or should have known what defects existed and had reason to believe that Wheeling-Pittsburgh Steel Corp. might use a negligent method of removing the defective hatch cover and took no steps to prevent harm to the longshoremen which was the foundation of liability on the part of the shipowner. Substituting defective stow for defective equipment then the instant case assumes familiarity.

In the wake of the *De Los Santos* decision the Court of Appeals for the Third Circuit recalled the mandate to permit a resubmission of a motion for reconsideration which had been previously denied in *Di Rago v. American Export Lines, Inc.,* 636 F. 2d 860 (3d Cir. 1980). The case is identical to the instant case in that the accident resulted from a dangerous stow in a prior port. An attempt was made in that case by the vessel-owner to avoid liability on the basis of an alleged violation of OSHA's Safety and Harbor Regulations for Longshoring. To this the court said:

> "Export places much reliance on the applicability of OSHA's Safety and Health Regulations for Longshoring, which impose on the stevedore who breaks down cargo the duty to take precautions, 'when necessary to prevent the remaining cargo from falling'. 29 C.F.R. §1918.83(b) (1979). However, the regulation does not by its terms preclude a finding that shipowner negligence also contributed to an accident by creating a latent danger. Indeed, to interpret the OSHA regulations as establishing a full shift of responsibility for purposes of §452(2) is to ignore the preface to the longshoring regulations which states:

> It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, . . . *Nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.*

29 C.F.R. *§1918.21(b) (emphasis added). See Blackburn v. Prudential Lines, Inc., supra.* Appellant fails to convince us that common law negligence doctrine has been preempted by the OSHA regulations.[3]" (636 F. 2d 865).

We also quote the footnote to the foregoing because it points up the essential reasons why petitioner was so harmed by the court's charge in the instant case:

> "3. Therefore, the court below was correct to inform the jury of the OSHA regulations as evidence of a stevedore's duties and the care with which a shipowner could legitimately expect a stevedore to proceed; but, it properly cautioned the jury that particular circumstances might indicate to a reasonably prudent shipowner that such an assumption was unwarranted, in which case the regulations did not subtract from the vessel owner's common law responsibility." (636 F. 2d 865).

The petitioner respectfully submits that given the insulation of the stevedore from the consequences of his misconduct if any and the brooding omnipresence of collusion by the stevedore

and the vessel-owner because of the competitive nature of the stevedoring industry that OSHA regulations are irrelevant to vessel-owner's liability and their utilization with the further claim of force of law carries with it a heavy prejudicial burden. Yet if they are to be admitted into evidence then the court has a duty to do as the court did in *Di Rago* and caution the jury that even if the violation of the regulations was the cause of the accident the regulations did not subtract from the vessel-owner's common law responsibility.

CONCLUSION

In sum total the issue as originally presented to this Court simply put, is whether a violation of OSHA regulations which causes an accident ultimately exculpates the vessel-owner as mandated by the court's charge or whether the court apart from generalities must specifically caution the jury that the vessel-owner can nevertheless be liable if it has created the circumstances which begat the stevedore's violations by creating an unnecessary hazard which the stevedore could not cope with. Anything less runs contrary Congress' reluctance to entrust the safety of longshoremen to the stevedore alone. *Di Rago v. American Export Lines, Inc.*, 636 F. 2d 860, 864 (3d Cir. 1980). *See also, Turner v. Japan Lines Ltd. et al.* (opinion attached) 9th Cir. (July 27, 1981).

Respectfully submitted,

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APPENDIX

EXTRACT FROM COURT'S CHARGE

You have heard testimony regarding the safety and health regulations for longshoring. They apply only to stevedoring companies and they are rules, the so-called OSHA rules, which the stevedoring companies such as plaintiff's employer must follow in conducting their work aboard vessels. If you find that plaintiff's employer failed to follow these regulations and that this failure was the sole cause of the accident, then you must find for the defendant.

Finally, if you find that the ship owner was in some measure negligent but you also find that the plaintiff himself was in some measure contributorily negligent, then you will have to make a determination as to the extent of the plaintiff's contributory negligence.

This case is governed by a statute passed by the United States Congress called the Longshoremen's and Harbor Workers' Compensation Act. In passing this law Congress expressed its concern with the enforcement of safety conditions in longshoring work. Accordingly, the law requires every stevedore to furnish and maintain places of employment aboard ships which are reasonably safe for its employees. The stevedoring company is required by law to furnish, maintain and use such safeguards with respect to the working conditions of its employees as are reasonably necessary to protect the life, health and safety of such employees and to prevent injury to the longshoremen. The stevedore and not the vessel owner is most intimately familiar with the procedures to follow in order to safely load, unload and shift cargo and the major responsibility for the proper and safe conduct of the work is to be borne by the stevedore.

Extract from Court's Charge

The vessel has no general duty continually to supervise the activities of the stevedore's equipment, or to assume responsibility for dangerous conditions in the vessel created by the stevedore in the course of its operations, at least when the vessel has no knowledge of the dangerous conditions.

The law, however, also imposes a responsibility on vessel owners and charges them with a duty to exercise reasonable care under the circumstances, in furnishing a safe place for the longshoremen to work.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *THOMAS W. GRIFFITH v. WHEELING-PITTSBURGH STEEL CORPORATION v. AMERICAN COMMERCIAL LINES, INC.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2159, 78-2160 and 78-2161

THOMAS W. GRIFFITH,
Appellant in No. 78-2159
Appellee in Nos. 78-2160/61

v.

WHEELING-PITTSBURGH STEEL CORPORATION,
Appellant in No. 78-2160
Appellee in Nos. 78-2159 and 78-2161

v.

AMERICAN COMMERCIAL LINES, INC.,
Appellant in No. 78-2161
Appellee in Nos. 78-2159/60

(Western Dist. of Penna. D.C. Civil No. 73-0706)

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES
No. 79-813

Submitted:
Before: GIBBONS, WEIS and HIGGINBOTHAM,
Circuit Judges
(Opinion Filed: August 11, 1981)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*

This case is before us on remand from the Supreme Court, which on May 4, 1981 granted certiorari to review our decision in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3d Cir. 1979) vacated our judgment, and remanded for further consideration in light of its decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. , 49 U.S.L.W. 4405 (1981). The parties were requested to file supplemental briefs addressed to the effect of the *Scindia* case on our judgment. Having considered those briefs and the several opinions filed in *Scindia* we conclude that our prior judgment is consistent with the Court's interpretation of Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b) (hereafter "the Act"), and should be reinstated.

In our most recent opinion[1] we held that the district court judgment against Wheeling-Pittsburgh in favor of

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1. Earlier this court reversed an award of summary judgment to Wheeling-Pittsburgh. *See* 384 F. Supp. 230 (W.D. Pa. 1974), *rev'd*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), *on remand*, 452 F. Supp. 841 (W.D. Pa. 1978).

the plaintiff must be vacated and remanded for further findings as to Wheeling-Pittsburgh's status as an owner *pro hac vice*. That decision is in no way affected by the Supreme Court's remand. We also held that the district court properly rejected Wheeling-Pittsburgh's claim that if it is an owner *pro hac vice*, it should be fully indemnified by the actual owner, American Commercial Lines, Inc. That holding likewise is unaffected by the Supreme Court's remand. We held, too, that if Wheeling-Pittsburgh is determined on remand to be an owner *pro hac vice*, it and American Commercial Lines, Inc. would be jointly and severally liable to the plaintiff, but the amount for which each would be liable must be redetermined because Wheeling-Pittsburgh would not be liable for contribution for negligence attributable to it in its capacity as a stevedore rather than as owner *pro hac vice*. The Supreme Court's remand in no way affects that holding. Finally, we held that American Commercial Lines, Inc. was negligent in delivering a barge with a defective cover mechanism knowing that workers such as the plaintiff would be thereby exposed to an unreasonable risk of injury for those defects. Only this negligence holding is within the contemplation of the Supreme Court's remand, since we noted in our last opinion, "Wheeling does not contest that, if it was properly held to be an owner *pro hac vice*, it was guilty of negligence in that capacity." 610 F.2d at 127. It did not petition for certiorari, and concedes in its supplemental brief that the only question open to it on remand is its status as an owner *pro hac vice* (Brief of Wheeling-Pittsburgh on Remand at 5). Thus the only question presented by the remand is whether *Scindia* requires us to reconsider our affirmance of the district court's holding that American Barge Lines, Inc. was negligent.

Our interpretation of Section 5(b) of the Act, 33 U.S.C. §905(b), was as follows:

> The sounder approach, we think, is to recognize that §905(b) imposes on vessel owners the same

> duty to exercise "reasonable care under the circumstances of each case" that would be applicable to a land based business. . . . Proceeding from this broad common law standard, federal courts may develop on a case by case basis a uniform federal law of negligence, referring for guidance to the "land based" standards of care established in the Restatement (Second) of Torts whenever such reference accords with the Congressional intent and is helpful to decision of the case at hand.
>
> At a minimum, we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board the ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

610 F.2d at 125-26. Reviewing the district court's application of the standard of reasonable care under all the circumstances, we held that each of these three criteria had been found and that the findings were not clearly erroneous. In particular the court found, and the evidence supported the findings, that American Commercial Lines, Inc. knew of the defective condition of the hatch cover, and was aware that Wheeling-Pittsburgh regularly used a method of removing stuck barge covers which would expose longshoremen to risk of harm. 610 F.2d at 126.

The holding of *Scindia* is that "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that *develop* within the confines of the cargo operations that are assigned to the stevedore." 49 U.S.L.W.

at 4410 (emphasis added). The case involved a dangerous piece of equipment on the vessel, not found to have been brought to the vessel owner's attention prior to commencement of stevedoring operations, and also improvident use by the stevedore of that equipment, not found to have been anticipated by the vessel owner. In this context, the Court ruled that "as a general matter" the vessel owner was entitled to assume that the stevedore would discover patent defects and avoid the risk they presented. *Id.* 4409. Here, by contrast the district court found that prior to turning control of the barge over to the stevedore, American Commercial Lines, Inc. knew or should have known of the defect, and had reason to believe that Wheeling-Pittsburgh might use a negligent method to remove stuck hatch covers, but took no steps to prevent harm to the injured longshoreman. Thus *Scindia* is clearly distinguishable from this case.

Moreover, we find in the Court's decision support for our interpretation of Section 5(b) quoted above. Referring to the duty owed by a vessel to longshoremen before cargo operations began, Justice White described it thus:

> [T]he vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be

> obvious to or anticipated by him if reasonably competent in the performance of his work. 394 U.S. at 416 n.18. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care he has breached his duty and is liable if his negligence causes injury to a longshoreman.

49 U.S.L.W. at 4408. While the quoted language does not deal with the precise situation in this case, of a shipowner with actual knowledge of a defect and a reasonable ground for believing that the stevedore will not remedy the resulting unsafe conditions, it is certainly consistent with the imposition of liability in such circumstances. That interpretation of the opinion of the Court is confirmed by Justice Brennan's concurring opinion:

> My views are that under the 1972 Amendments: (1) a shipowner has a general duty to exercise reasonable care under the circumstances; (2) in exercising reasonable care, the shipowner must take reasonable steps to determine whether the ship's equipment is safe before turning that equipment over to the stevedore; (3) the shipowner has a duty to inspect the equipment turned over to the stevedore or to supervise the stevedore if a custom, contract provision, law or regulation creates either of those duties; and (4) *if the shipowner has actual knowledge that equipment in the control of the stevedore is in an unsafe condition, and a reasonable belief that the stevedore will not remedy that condition*, the shipowner has a duty either to halt the stevedoring operation, to make the stevedore eliminate the unsafe condition, or to eliminate the unsafe condition itself.

> Since I read the Court's opinion to be consistent with these views, I join the Court's opinion.

49 U.S.L.W. at 4412. (Emphasis supplied).

Even if it remains jointly liable with Wheeling-Pittsburgh *qua* owner *pro hac vice*, American Commercial Lines, Inc. nonetheless submits that its potential share of liability is reduced by *Scindia* because of the significance that decision attaches to a vessel's knowledge of the negligence of the stevedore. American argues that its share of the total award must necessarily be less than Wheeling-Pittsburgh's if the latter's agent had actual, rather than constructive, knowledge of the stevedore crew's poor judgment shortly before the accident happened. However, we discern nothing in *Scindia* which requires that the calculation of comparative fault mirror distinctions between actual and constructive knowledge to the exclusion of all other factors.

The judgment of this court entered upon our opinion reported at 610 F.2d 116, dated August 24, 1979, will be reinstated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *LAWRENCE A. SARAUW v. OCEANIC NAVIGATION CORP.*

MARIS, *Circuit Judge*

This appeal from the district court's award of damages to a longshoreman in his action against a vessel and its owner in which appeal we entered a judgment on May 20, 1980, is again before us, the Supreme Court having, on the grant of the defendants' petition for a writ of certiorari, vacated our judgment and remanded the appeal to us for reconsideration in the light of that Court's recent decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. (1981).

Lawrence A. Sarauw, a longshoreman dock worker employed by Hess Oil Virgin Islands Corporation (hereafter Hess), brought this action in the district court against the vessel, VLCC ANDROS ATLAS, and its owner, Oceanic Navigation Corporation (hereafter Oceanic), pursuant to section 18(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 33 U.S.C.A. §905(b). That section provides that a longshoreman sustaining injuries attributable to the negligence of the personnel of a vessel may sue the vessel for damages. Sarauw alleged that due to the negligence of the officers of the ANDROS ATLAS in failing to secure to the deck of the vessel the gangway connecting the vessel with the Hess Terminal's No. 3 dock where the ANDROS ATLAS was discharging crude oil, the gangway, when Sarauw attempted to board the vessel by means of it, fell to the dock, Sarauw thereby sustaining the injuries complained of.

After a trial lasting four days, a jury found that Oceanic was negligent, that Sarauw was contributorily negligent, that Hess also was negligent, and that Sarauw's total damages were $190,800.00. The district court, on March 27, 1979, entered judgment for Sarauw reducing the total damages found by the jury by 50%, the jury having determined the degree of fault of Sarauw and

Hess to be 25% each. Following the district court's denial, on June 8, 1979, of Sarauw's motion for judgment notwithstanding the verdict and to amend the judgment and Oceanic's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, both parties appealed.

With respect to Sarauw's appeal, we held that the district court's 25% reduction of damages for Hess' negligence was error under *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). Our ruling on that issue was not contested by Oceanic. As to the issues raised by Oceanic on its appeal, on the question of Oceanic's duty of care we concluded that there was sufficient evidence from which a jury could find that Oceanic retained a duty of care with respect to the gangway notwithstanding that it was supplied by Hess, and that Oceanic breached its duty of care. On the question of the district court's instructions based on sections 343 and 343A of the Restatement (Second) of Torts, we held that any error in applying to Oceanic the duty of care set forth in those sections of the Restatement benefited Oceanic and was not ground for reversal of the district court's judgment against Oceanic. With respect to Oceanic's contention, not raised in the district court, that elements of damages awarded Sarauw were duplicative, we held that no reviewable, plain error had been committed. Pursuant to the above rulings, we affirmed that part of the district court's judgment which denied Oceanic's motion for judgment notwithstanding the verdict or for a new trial and vacated that part of the judgment which denied Sarauw's motion for judgment notwithstanding the verdict and to amend the judgment. We remanded the case to the district court with instructions to enter a new judgment restoring the deduction from the jury's damages award made for Hess' negligence.

Oceanic then applied to the Supreme Court for a writ of certiorari. The writ was allowed on May 4, 1981.

and on the same day the Supreme Court vacated our judgment and ordered our reconsideration of the cause in the light of the Court's recent rulings in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. (1981), explicating the extent of a vessel's duty of care to longshoremen under 33 U.S.C.A. §905(b). Counsel, at our request, have submitted briefs on the issues raised by the remand.

The facts of the case are set out in our earlier opinion, 622 F.2d 1168 at p. 1171, and we need not repeat them here.

The *Scindia* case gives us no reason to reconsider our conclusion on the damages issue raised by Oceanic's appeal and our position on that issue, stated above, remains unchanged. We, accordingly, proceed to address the liability issues presented by Oceanic's appeal in the light of the ruling of the Supreme Court in *Scindia*. In that case the Court pointed out that under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, particularly §905(b), "Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore." 451 U.S. at p. . "We are of the view," the Court went on to say, "that absent contract provision, positive law or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoreman for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself." 451 U.S. at p. .

The precise question which this case presents on remand is whether the gangway here involved which was supplied by the stevedore and used by its longshoremen was an appliance which was "within the confines of

the cargo operations" assigned to the stevedore within the meaning of the rule laid down in the *Scindia* case and, therefore, outside the general duty of the shipowner to use reasonable care to inspect and supervise for the purpose of discovering and remedying dangerous conditions which might exist or develop in the course of its use. We do not think that the gangway involved in this case falls into that category. Conceivably, there might be a case in which a special gangway, which is in addition to the ship's regular gangway, is supplied by a stevedore for the exclusive use of its longshoremen in carrying out its cargo operation and which, therefore, might be regarded as wholly within the confines of that operation under the *Scindia* rule. But this is clearly not such a case.

Here the stevedore, Hess, which was the owner of the marine terminal at which the ANDROS ATLAS was unloading, required all vessels unloading at its terminal to use only gangways supplied by it, the stevedore. Accordingly, here the gangway supplied by the stevedore became the vessel's gangway in the sense that it was the only gangway available to the vessel. It was, therefore, necessarily used for embarking and disembarking by the officers and crew of the vessel and any others having business on her as well as by the longshoremen. It thus became, when put in place, a basic appurtenance of the vessel, its means of access to the land. *The Admiral Peoples*, 295 U.S. 649 (1935). We are, accordingly, satisfied that *Scindia* does not require us to depart from our original conclusion, which we reaffirm, that Oceanic had the duty to exercise reasonable care with respect to the gangway's being properly secured to the vessel and maintained in safe condition for use. From this duty of care it could not divest itself even though the gangway was supplied by the stevedore, Hess, and at the time of the accident was being used by no one but the injured longshoreman. *Romero Reyes v. Marine Enterprises, Inc.*, 494 F.2d 866, 870 (1st Cir. 1974).

Opinion

Oceanic argues in its brief on remand that under *Scindia* a shipowner's ordinary duty of care may be modified by contract and that in its "contractual undertaking with Oceanic, Hess obligated itself to . . . furnish, secure, maintain and monitor the gangway to be used on Oceanic's vessel." We are not convinced, however, that *Scindia* instructs that a shipowner may contract away its duty of care with respect to such an essential appurtenance of the ship as the gangway. Moreover, while there was evidence in the record that Hess instructed its personnel to monitor the safety of the gangways of the ships docked at its terminal, there was no evidence of an agreement under which Hess undertook to relieve the ANDROS ATLAS of its legal obligation concerning the gangway here involved.

In the present case there was evidence from which the jury could find, as it did, that Oceanic failed in its duty of exercising due care to discover and correct the unsafe condition of the gangway which, obviously, became more and more critical as the vessel rose in the water during unloading. We remain satisfied, as we were when the case was here before, that the instructions fairly presented this issue to the jury and that Oceanic's motion for judgment notwithstanding the verdict or for a new trial was properly denied. The other issues are discussed in our former opinion and are not involved in this remand. We, therefore, need not discuss them here.

The judgment entered by this court in this case on May 20, 1980 will be reinstated.

Opinion

ADAMS, *Circuit Judge*, concurring.

I agree that our previous judgment in this case should be reinstated, but I write separately to illustrate why, in my view, the reasoning in the prior opinion is consistent with *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 490 U.S.L.W. 4405 (U.S. Apr. 21, 1981).

Although the thrust of the opinion in *Scindia* is to restrict the shipowners' liability to longshoremen injured in the midst of stevedoring operations, the case does not proclaim that a vessel may never be found negligent in connection with mishaps suffered by longshoremen. The Supreme Court crafted at least two exceptions to the freshly promulgated policy against holding the shipowner responsible. First, the Court noted that it is "accepted that the vessel may be liable . . . if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas or from equipment under the active control of the vessel during the stevedoring operation." 49 U.S.L.W. at 4408. Second, the Court indicated that in some circumstances "positive law or custom" may impose on the shipowner "a duty of supervisory inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations." 49 U.S.L.W. at 4410.

Both of these principles are directly applicable to the case at hand. In our initial opinion we held that the shipowner maintained control over the manner in which the gangway was to be secured. 622 F.2d 1168, 1172 (3d Cir. 1980). Relying on testimony by the plaintiff's expert, which was corroborated by the ship's captain and second officer, we also affirmed the trial court's finding that the evidence established a duty on the part of the shipowner to secure, maintain, and watch over the gangway. *Id.* at 1172. The source of this duty is the custom of "good seamanship" and the tradition of maritime law. The present case therefore comes within the cir-

cumstances delineated in *Scindia*, under which the shipowner may be found liable for injuries to longshoremen occurring during stevedoring operations. The vessel owner did not exercise due care with regard to the gangway area, which remained under the vessel's active control, *see* 490 U.S.L.W. at 4408; and, the custom of admiralty dictates that the shipowner had a continuing duty to watch over and inform itself about hazards involving the gangway and the manner in which it was fastened to the ship, *see* 49 U.S.L.W. at 4410. Although this duty to inspect and supervise may be shared with the stevedore by contract, according to the trial testimony the shipowner may not transfer the ultimate responsibility.

The vessel owner argues that *Scindia* hinged on a distinction between equipment owned by the vessel and items owned by the stevedore. The previously quoted language in the Supreme Court's opinion, which emphasizes control and duty, rather than ownership, is at variance with the shipowner's interpretation of *Scindia*. Control over the defective condition remains a crucial factor in imposing liability. This conclusion is consistent with the policy underlying the Supreme Court's decision. The Court disparaged rules that would "result in holding the shipowner solely liable for conditions that are attributable to the stevedore." 49 U.S.L.W. at 4409. This result would come about when the owner has no control over a defective condition. When the owner retains a measure of control, however, a defect cannot fairly be attributed solely to the neglect of the stevedore. In the present case, for example, the jury found that both the stevedore and the owner had some control over the gangway and that both negligently breached their respective duties to monitor the way in which the gangway was attached to the ship.

Because our initial opinion in this matter correctly presaged the role the Supreme Court assigned in *Scindia* to control by the vessel owner over the area in

question and to a customary duty to inspect, it remains viable. I therefore agree that the judgment for Sarauw must be reinstated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *TURNER v. JAPAN LINES, LTD.*

JAMES TURNER,

Plaintiff-Appellant and Cross-Appellee,

v.

JAPAN LINES, LTD., and PHILIPPINE PRESIDENT LINES, INC., MANILA,

Defendants-Appellees and Cross-Appellants.

Nos. 79-4060, 79-4062 and 79-4182

Unites States Court of Appeals,
Ninth Circuit

Argued and Submitted Dec. 11, 1980

Decided July 27, 1981

Off-loading longshoreman, who was injured when a defective stow collapsed, brought action against owner and time-charterer of the vessel. The United States District Court for the District of Oregon, Otto R. Skopil, Jr., J., granted judgment, n.o.v., in favor of the owner and time-charterer, and the longshoreman appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) owner and time-charterer had a duty to protect the off-loading longshoreman from concealed dangers created by foreign loading stevedore which could have been corrected or warned of, in the exercise of reasonable care; (2) evidence that owner and time-charterer knew or should have known that the stow was unreasonably dangerous to off-loading longshoremen and that the defect could not have been

discovered by them was sufficient to support jury's verdict in favor of the off-loading longshoreman; and (3) under clause of the charter party between the owner and time-charterer making the time-charterer responsible for the "load, stow, trim and discharge" of the cargo and liable for any injuries to cargo or longshoremen resulting from the improper performance of such operations, time-charterer was responsible for injuries sustained by the off-loading longshoreman and, therefore, the time charterer had to indemnify the owner of the vessel for any damages paid to the off-loading longshoreman.

Reversed and remanded.

1. Shipping 84(3)

Owner and time-charterer of vessel had duty to protect off-loading longshoreman from concealed dangers created by foreign loading stevedore which could have been corrected or warned of, in the exercise of reasonable care. Longshoremen's and Harbor Workers' Compensation Act, §5(b) as amended 33 U.S.C.A. §905(b).

2. Shipping 86(2¾)

Evidence that owner and time-charterer of vessel knew or should have known that stow was unreasonably dangerous to off-loading longshoremen and that the defect could not have been discovered by them was sufficient to support jury's verdict in favor of off-loading longshoreman, who was severely injured when the defective stow collapsed. Longshoremen's and Harbor Workers' Compensation Act, §5(b) as amended 33 U.S.C.A. §905(b).

Opinion

3. Indemnity 8(4)

Under clause of charter party between owner and time-charterer of vessel, making the time-charterer responsible for the "load, stow, trim and discharge" of the cargo and liable for any injury to cargo or longshoremen resulting from the improper performance of such operation, time-charterer was responsible for injuries sustained by off-loading longshoreman, who was severely injured when a defective stow collapsed, and, therefore, time-charterer had to indemnify the owner of the vessel for any damages paid to the off-loading longshoreman.

Appeal from the United States District Court for the District of Oregon.

Before FLETCHER and FERGUSON, Circuit Judges, and GRANT, District Judge.*

FLETCHER, Circuit Judge:

These are appeals and cross-appeals from a judgment n.o.v. for defendants Japan Lines and Philippine President Lines, following a jury trial in which plaintiff-appellant Turner received a verdict for $955,976.11. Turner appeals from the grant of judgment n.o.v.; Japan Lines and Phillippine President Lines cross-appeal to attack the jury verdict, if it should be reinstated.

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* The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

Opinion

I

FACTS

Turner was a longshoreman in Longview, Washington. On June 13, 1974, he was unloading plywood from the PRESIDENT QUEZON when a stack of plywood in the hold collapsed beneath him. Turner incurred serious injuries, and as a result now suffers from an apparently untreatable form of epilepsy.

The vessel PRESIDENT QUEZON is owned by Phillipine President Lines (Owner). At the time of Turner's accident, the vessel was time-chartered to Japan Lines, Ltd. (Time-Charterer) under the New York Produce Exchange charter party. The cargo of plywood was loaded on the PRESIDENT QUEZON in Kushiro, Japan by Mitsuwa Transport Co., a stevedore, pursuant to a contract with the Time-Charterer. Another Japanese firm was engaged to shore and lash the cargo, and the completed stow was inspected by a licensed Japanese marine surveyor.

At trial, Turner produced evidence to show how stacks of plywood should be stowed in the hold of a ship and how the plywood on which he was injured was improperly stowed. According to the testimony, the hull of the vessel curves outward and upward from the deck of the lower hold. This concave curvature is called the "sheer" of the ship. When bundles of plywood are stowed against the sheer, the first stack of bundles (three or four feet thick) is butted against the sweat battens, which protect the cargo from contact with the bare hull. Dunnage (lengths of scrap lumber) is placed on top of the stack to separate it from the stack above, so that when the cargo is unloaded the forks of lift trucks can be fitted between them. The

next stack of plywood is placed atop the dunnage and butted against the sheer. This stack rests only partially on the first stack; part of it is unsupported from below because of the outward curve of the sheer. In order to prevent the stack from tipping under the weight of workers or of the stacks on top of it, it must be "shored" from below. The shoring consists of vertical lengths of lumber nailed upright between the dunnage timbers and the sweat battens of the hull. The shoring, or lack of it, is invisible to the offloading longshoreman until the plywood it supports is removed.

The evidence showed that no nails were found in the pile of lumber under the collapsed plywood after the accident. Expert testimony indicated that it should be inferred from this that the shoring had not been constructed properly. There was also evidence that a properly shored stack of plywood should not have collapsed under the weight of a longshoreman.

Witnesses testified that many hours of work by marine carpenters would have been required to build proper shoring. The vessel's log indicates the time at which the marine carpenters who constructed the shoring entered the hold. This, according to plaintiff, indicates that the master or one of the mates was aware that the shoring work had begun, and had ample opportunity to monitor it.

Plaintiff also called expert witnesses who testified as to the duties of the master of the ship in overseeing the stow of the cargo. The experts testified that the master's primary duty is to protect the seaworthiness of the vessel and the safety of the crew and passengers. The master is also responsible for the safety of the cargo and those who unload it. The master or one of his mates is always on watch on the vessel. The experts also testified that the master or one of his mates is responsible for overseeing the loading operations and particularly for ensuring that the cargo is properly shored.

Opinion

The evidence showed that Turner was injured when he was standing atop three stacks of plywood, nine to twelve feet above the deck of the hold. He was in the process of rigging the ship's hoisting gear to the top stack of plywood when the stack tipped beneath him. The falling stack knocked the stacks underneath it away from the sheer of the hull, and the entire stack collapsed. Turner was struck on the head.

This testimony was uncontradicted by defendants, who submitted only documentary evidence. The magistrate instructed the jury that the Owner or the Time Charterer or both would be liable to the plaintiff if the master of the vessel knew or in the exercise of reasonable care should have known of the defective stow and of the danger it posed. The magistrate also submitted to the jury the question whether, if the master of the vessel was found to have been negligent, he was acting for the Owner or the Time-Charterer or both. The jury returned its verdict for plaintiff against both defendants.

After the jury returned its verdict, the magistrate granted judgment n.o.v. to the defendants on the authority of *Ruffino v. Scindia Steam Navigation Co.*, 559 F. 2d 861 (2d Cir. 1977). It is unclear from the order granting judgment whether the magistrate considered the evidence insufficient to go to the jury on the question of negligence, or whether he concluded that defendants had no duty to plaintiff as a matter of law.

The questions presented for our review are:

(1) whether the defendant(s) owed any duty to the plaintiff under the circumstances of this case;

(2) if so, whether the evidence was sufficient to support the jury's verdict;

(3) if so, whether under the charter party, the Owner or the Time-Charterer or both are liable to plaintiff for his injuries.

II.

NEGLIGENCE

A. Vessel's Duty to Longshoremen

This case arises under §5(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §905(b) (1976). That section, as amended in 1972, gives an injured longshoreman a cause of action against a "vessel" for its negligence. "Vessel" is defined to include the vessel's "owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member." 33 U.S.C. §902(21). However, since the 1972 amendments the longshoreman no longer has an action against the vessel for unseaworthiness, a type of liability without fault. *Compare Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), *with Scindia Steam Navigation Co. v. de los Santos,* ___U.S.___, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981).[1]

1. Considerable controversy has arisen over what constitutes "negligence" as opposed to "unseaworthiness." Some commentators have suggested that the difference between the two causes of action is slight, since most unseaworthy conditions are the result of someone's negligence. *See e.g.,* G. Gilmore & C. Black, *The Law of Admiralty* 452-55 (2d ed. 1975). The two situations in which an injured longshoreman can no longer recover from the vessel would seem to be (1) where the injury is the result of a condition of which the vessel has no notice or opportunity to correct, and (2) where the injury is caused entirely by the negligence of a third party, *e.g.,* the longshoreman's stevedore-employer. *Id.* at 452. This interpretation comports well with the purposes of the 1972 amendments. *See* H.R.Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4699, 4703-05.

Opinion

The Supreme Court has recently held that negligence under §905(b) is to be measured by the general maritime standard of reasonable care under the circumstances, and that

> [t]his duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Scindia Steam Navigation Co. v. de los Santos, 101 S. Ct. at 1621. *Scindia* involved a longshoreman who was injured by an allegedly defective winch during offloading operations. The shipowner there contended that it had no duty to repair the ship's equipment once the stevedore had commenced work. The Court rejected this contention, holding that if the shipowner was or should have been aware of the winch's condition and of the unreasonable risk of harm to the longshoreman, and if it were clear that the stevedore would not or could not remedy the problem, the shipowner would have a duty to intervene. *Id.*

The defendants here argue that neither the Owner nor the Time-Charterer had any duty to supervise the activities of the loading stevedore, so that neither can be held liable to an offloading longshoreman for injuries which result from the

loading stevedore's negligence. We have found one decision apparently adopting this view. *Ruffino v. Scindia Steam Navigation Co.*, 559 F. 2d 861 (2d Cir. 1977).

There are, to be sure, other cases in which courts have rejected attempts by longshoremen to recover from a vessel for failure to supervise the work of the stevedore. With the exception of *Ruffino*, however, those cases involve injuries incurred during stevedoring operations and allegedly caused by the injured *employee's* stevedore-*employer's* negligence. In this context, the Supreme Court in *Scindia* and the circuits in numerous cases have reviewed the reasons why, under the amended Act, it would be undesirable to impose liability on the shipowner for failing to supervise minutely the stevedore-employer's operations. *See, e.g., Scindia Steam Navigation Co. v. de los Santos*, ____U.S.____, 101 S. Ct. 1614, 1622-24, 68 L. Ed. 2d 1 (1981); *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F. 2d 837, 840-41 (2d Cir. 1977). The shipowner, after the 1972 amendments, no longer has a right over against the stevedore-employer for its concurrent negligence. 33 U.S.C. §905(b); *Scindia Steam Navigation Co. v. de los Santos*, 101 S. Ct. at 1624; *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F. 2d at 841. However, if the longshoreman recovers from the vessel in a negligence action, the stevedore-employer can then recover from the longshoreman the value of the compensation payments made to him. 33 U.S.C. §933. Thus, the stevedore-employer would be effectively relieved of any liability, even if it were primarily at fault. This result would remove any incentive to the stevedore to improve the safety of its operations, thus vitiating one of Congress' goals in enacting the amendments. *Scindia Steam Navigation Co. v. de los Santos*, 101 S. Ct. at 1629 (Powell, J., concurring); *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F. 2d at 841.

This concern may be justified, but it has no relevance to the case before us. The third party that is primarily negligent is not the plaintiff's employer, but rather the Japanese stevedore (the negligence of the vessel is premised on failure of the master to exercise reasonable care in supervision of the work of the Japanese stevedore). Section 905(b) does not bar the shipowner from recovering against the foreign stevedore, only from recovering against the "employer" as defined in the Act. 33 U.S.C. §902(4). Second, the fact that the plaintiff's stevedore-employer will be able to recover the compensation payments it has made does not in any way diminish its incentive to maintain safe operations. The posited negligence here is that of the foreign stevedore; the parties agree that the stevedore-employer could not have prevented this accident by any exercise of care.

[1] To the contrary, imposing a duty on the Owner or Time-Charterer or both in this case should further the congressional goal of safety. The foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it. As between the vessel and the stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoremen. The offloading stevedore has no control whatsoever over the foreign stevedore. The vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore. We do not believe that Congress, in enacting a careful scheme of compensation and liability, could have meant to leave the longshoreman to the mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy. We hold, therefore, that the vessel had a duty to protect the plaintiff against concealed dangers created by a

foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of.[2]

B. Sufficiency of the Evidence

[2] The next question we must consider is whether the plaintiff presented sufficient evidence from which the jury could have concluded that the vessel knew or should have known of the lack of shoring in the hold, and of the resulting danger. We think that sufficient evidence was presented.

This court will not disturb a jury's verdict "unless we find that the evidence was insufficient as a matter of law to support [the] verdict—that the evidence was such that no reasonable man would accept it as adequate to establish the existence of each fact essential to liability." *Kunz v. Utah Power & Light Co.*, 526 F. 2d 500, 504 (9th Cir. 1975). *See also, California Computer Products, Inc. v. International Business Machines Corp.*, 613 F. 2d 727, 734 (9th Cir. 1979).

As noted above, the plaintiff presented experts who testified as to the custom in the industry with respect to the master's, and hence the vessel's responsibility. Defendants argue that this testimony was irrelevant and entitled to no weight at all, because the experts spoke in terms of the master's duty to ensure the "seaworthiness" of the vessel, a concept supposedly irrelevant under §905(b). This argument, however, misses the point. The experts testified not about legal conclusions ("unseaworthiness" or "negligence") but about custom in the industry with respect to the master's duties. Furthermore, the master *is* responsible for the seaworthiness of the vessel; he is simply not liable without

2. To the extent that this holding is inconsistent with the result reached in *Ruffino v. Scindia Steam Navigation Co.*, 559 F. 2d 861 (2d Cir. 1977), we must, for the reasons given above, disagree with the Second Circuit.

fault to injured longshoreman. *See, e.g., Nichimen Co. v. M.V. Farland,* 462 F. 2d 319, 331-32 (2d Cir. 1972). Since the jury was quite properly not instructed in terms of strict liability for unseaworthiness, there is no possibility that it might have confused the two related meanings of the term.

The Supreme Court in *Scindia* observed that a "necessary inquiry is whether the pertinent statutes, regulations, or custom place or assume a continuing duty on the vessel." 101 S. Ct. at 1626 (emphasis added). We believe that the expert testimony offered by plaintiff was relevant, and perhaps necessary, to establish the customary scope of the master's duties.

In addition to this expert testimony, plaintiff offered the testimony of longshoremen as to how the cargo should have been shored and how long the shoring should have taken; entries into the ship's log noting when the marine carpenter entered the hold; and testimony that the master or his mates were responsible for continuous supervision of the loading operations, particularly the shoring of the cargo.[3] Plaintiff also produced evidence that the stow of the cargo was unreasonably dangerous to the offloading longshoremen, and that the defect could not have been discovered by them.

We hold that the evidence taken together was sufficient to support the jury's verdict for plaintiff, and that the magistrate erred in giving judment n.o.v. to defendants.

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3. The plaintiff also argues that he is entitled to the benefit of an inference against defendants because they failed to produce the testimony of Captain Pucan, the master of the vessel. Defendants had apparently notified plaintiff of their intent to produce Captain Pucan, and in fact he was present at the trial. Defendants put on no evidence at trial and neither plaintiff nor defendants called Captain Pucan. We need not address this argument because we hold that the plaintiff's evidence was sufficient to support the verdict without this inference.

III

INDEMNITY

Having decided that the "vessel" negligently caused plaintiff's injuries, we must determine whether the liability falls on the Owner, the Time-Charterer, or both. The magistrate asked the jury to decide whether, under Clause 8 of the charter party,[4] the master was acting for the Owner or the Time-Charterer when he failed properly to supervise the cargo operations. The jury responded by holding both defendants liable.

We think that the trial court misperceived the question, and that it was error to ask jury to interpret the contract. First, the contract was not relevant to the *duty* owed by either defendant to the plaintiff. *Cf. Scindia Steam Navigation Co. v. de los Santos,* 101 S.Ct. at 1626 (contract between vessel and stevedore relevant to vessel's responsibility for safety of stevedore's employees). The question was put to the jury, and the jury decided, that the *vessel* was negligent in either its supervision of the loading operations or its failure to warn plaintiff of a dangerous condition, or both. The vessel discharged its duties through the master, who was an agent of both the Owner and

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4. Clause 8 of the charter party provides:

> That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow and trim and discharge the cargo at their expense and risk under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

the Time-Charterer under the charter party. Thus, inasmuch as the jury decided that the loading operations were negligently supervised, it was correct to hold both the Owner and the Time-Charterer liable. It was not up to plaintiff to prove, as between the defendants, which party had contracted to bear the responsiblity for loading and unloading operations.

Second, the interpretation of the contract in this context was a question of law and should have been decided by the court. *See, e.g., Migut v. Hyman-Michaels Co.*, 571 F. 2d 352 (6th Cir. 1978); *Fernandez v. Chios Shipping Co.*, 542 F. 2d 145, 151-53 (2d Cir. 1976). Since the trial court has not considered the question, this court is entitled to do so in the first instance. *See East Oakland-Fruitvale Planning Council v. Rumsfeld*, 471 F. 2d 524, 529 (9th Cir. 1972).

[3] The issue before us is whether Clause 8 of the charter party entered into by the defendants places the responsibility for injuries to longshoremen caused by the negligent supervision of cargo operations on the Owner or on the Time-Charterer. The charter party in question, the New York Produce Exchange form, is widely used and has been construed frequently by the courts. *See, e.g, Fernandez v. Chios Shipping Co.*, 542 F. 2d 145 (2d Cir. 1976); *Nichimen Co. v. M.V. Farland*, 462 F. 2d 319, 330-34 (2d Cir. 1972). *See generally* G. Gilmore & C. Black, *The Law of Admiralty* 229-39, 1003-10 (2d ed. 1975); M. Wilford, T. Coghlin, & N. Healy, *Time Charters* 137-42 (1978). The Second Circuit in *Fernandez* faced the identical issue. It held that Clause 8 of the charter party, which makes the time-charterer responsible for the "load, stow, trim and discharge" of the cargo, *see* note 4 *supra*, also makes the time-charterer primarily liable for any injury to cargo or longshoremen which results from the improper performance of those operations. *Id.* at 151-53.

Opinion

We agree with the decision of the Second Circuit.[5] Because plaintiff's injury was caused by improper loading of the cargo, we hold that the Time-Charterer must indemnify the Owner for any damages paid to plaintiff.

REVERSED and REMANDED for proceedings consistent with this opinion.

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5. Defendant Time-Charterer argues that the Fifth Circuit reached a contrary conclusion in *D/S Ove Skou v. Hebert*, 365 F. 2d 341, 351-52 (1966). That case was decided prior to the 1972 amendments to the LHWCA. The court denied the owner indemnity from the time-charterer for damages owed to an injured longshoreman, under Clause 8 of the charter party. *See id.* at 344 n. 5. The court held that the time-charterer made no warranties to the owner that the stevedores hired by the time-charterer would perform in a workmanlike manner. The jury had found that the owner negligently maintained its ship in a defective condition, and that the stevedore negligently failed to discover the condition and correct it. In contrast, in the case at bar the negligence found by the jury occurred in the course of precisely those operations for which the time-charterer had assumed contractual responsibility. The defect was not one in the ship's equipment, as it was in *Hebert*. Had it been, we would certainly reach a different result, since the Owner expressly warranted in the charter party that it would maintain the ship in a seaworthy condition.